

2

A SHORT
R E V I E W
OF A
LATE PAMPHLET,

INTITULED,
SOME CONSIDERATIONS on the *Law*
of *Forfeitures for High Treason.*

England Law & Statute
VIII
George II.



L O N D O N:
Printed for J. ROBERTS, in *Warwick-Lane.*
MDCCXLVI.
[Price One Shilling.]

REV E V

170

LATE PAMPHLET

0227121

10-11-12

17X0314

A SHORT
R E V I E W

Of a Late

PAMPHLET, &c.

MY Design, in these Remarks, is not at all aimed at the Person of the Author, whom I know not, or to cavil at Inaccuracies of Stile, of which there are scarce any, but merely to deliver my own Thoughts with the same Freedom as he has done his: I wish I may be able to argue as well. Therefore, before I go any further, I advise any ill-natured Critick, who reads, either in hopes to hear him abused, or his Expressions perverted; or to have an Opportunity to expose me for so uncandid a Way of acting, to leave off here; for I am determined not to write a Syllable in that, or any other Way, which has not an absolute Connection with the Matter in Hand: And, by this means, I hope, the Author himself will not be offended at my endeavouring to shew; that the Arguments maintaining an Opinion

B

contrary

contrary to his, are of equal Force with his own, especially as he seems, *p.* 4. so warm an Advocate for the Liberty of the Press; it is that Privilege I now write under, not as a Censor, an Office I am far unequal to, but as an Advocate, tho' I own much inferior to my Antagonist, whose Abilities shine so evidently through his whole Work, that nothing can make me hope for Success, but the Justice of the Undertaking and Cause. The Question under Debate, I take to be, whether in reality the Punishment by Forfeiture be not contrary to NATURAL JUSTICE, rather destructive to the State than salutary, and as prejudicial to the Punishers as to the Punished? or the strongest Bulwark to defend the State from the Attempts of Traitors?

The principal Argument made use of to the real Question, is the Antiquity of the Law, and the Danger of reversing any Laws; for, says he, *p.* 3. "When old Foundations are weakened, or Land-marks removed, though with
" a plausible Design to secure or extend Liberty, the *English* Subject is the Loser by
" every such Innovation." This Maxim has been often found faulty; and if it were never to be departed from, we should have little Occasion for a Legislative Power; and a House of Lords, or of Commons, would be quite useless.

This, in effect, is the Ground-work on which the Test in *Scotland*, under King *Charles II.* so much cried out against, was founded: And the

the Maxim is so far from being of any Consequence or Weight, that one very contrary seems a Rule for this Country, and for those who govern it; *viz.* That every Member is by Nature obliged to propose, to second, and to promote all such Additions and Alterations to the present Laws, the Making of new ones, and the Repealing of old ones, as he thinks conducive to the Public Good; nor ought any Motive of Fear of Change to prevent him from such a Conduct. That this has been the Maxim universally followed, is evident from the History of all States.

The Court of *Star-Chamber*, at the Time it was taken away, was very ancient; yet the Antiquity thereof was not allowed a sufficient Reason to preserve it, when the Liberty of the Subject required its Abolition. But perhaps our Author may say, That the Institution of it was an Innovation in itself. Be it so: But the Court of *Wards* certainly was not; neither were there the same tyrannical Proceedings there, to occasion its being abolished. But, to come lower down, many salutary *Innovations* (as our Author calls them) were made at the Time of the Revolution, and Union; such as the Alteration of the Forms of Tryals, the Act for triennial Parliaments, and that Bulwark of *English* Liberty which constitutes the Judges *quandiu se bene gesserint*, the Act for Reducing of Treasons in *Scotland* to the same Foot as in *England*; and no *British* Subject ever found

any Hurt from these, or any of the other Laws made at that Time; and that they will not by the Statute 7 *Annæ*, c. 21. I will endeavour to shew by-and-by.

Our Author, p. 5. says, "every well-regulated State, either absolute or free, is provided with this Regulation." That the Generality of States are so, is very true; but there is a limited Manner, even in this respect: And tho' our Author, in another Part, denies that the Forfeitures are redeemable in *Holland*, notwithstanding that Bishop *Burnet* insists on it, yet the Reverend Prelate was certainly in the Right, as to some Parts of those Countries; for *Matthæas** mentions the several Sums of Redemption, according to the Ranks and Degrees that Men bore in the State: And some States there are, where these Forfeitures take not place.

Surely it is no unbecoming Irreverence to our Ancestors, to defend their making the Clause of the 7 *Annæ*, c. 21. now in Dispute; or any Neglect of Posterity to protect them and their Fortunes from the Attacks of any future ambitious or covetous Minister whatsoever.

Our Author now comes to his main Work, and begins by endeavouring to answer an Objection, which he says "touches the *Fugulum Causæ*; viz. that the extending these Forfeitures to the Posterity of the Criminal, are "contrary to the Principles of natural Justice." This he denies to be the Case; and urges to

* *Matt. de Nob. l. 1. c. 2.*

support

support this Denial his favourite Proposition, that "the Power of transmitting Property is " derived from the Favour of Society:" With some further Considerations on the Nature of Punishments.

The main Arguments in favour of this Objection, according to him, is, *Nemo punietur pro alieno delicto*; (That no Man should suffer Punishment for the Crime of another.) To answer this, he cites the Case of Subjects, and of Corporations, who often suffer for the Crimes of their Sovereign, or particular Members: And afterwards replies to himself, by saying that the Cases are not comparative; for a Father and Children may easily be separated in Punishment, which the others cannot be. The above Objection he thinks of some Moment; and therefore has bestowed some Pains to remove it.

First, he says, That "this Punishment by Forfeiture is a principal Pillar of Society, founded " on a Principle that natural and social Affections " should controul irregular and selfish Passions." Tho' our Author, as yet, offers no Proof to support this Point; and I might reasonably deny it as peremptorily; I add, that Experience will shew, that when a Man is abandoned enough to commit a Crime considerately, and to hazard his own Life intrepidly, it is not any Affection for Posterity that will restrain him. Perpetual Experience has shewn this, more especially when they are Enthusiasts enough to think, that the Cause is a good one. There are very few *Coriolani*

violanti in the World; and the Power of a *Volumnia* or a *Virginia*, Characters still more rare, could only restrain him from executing, not from the involving himself in Treason, tho' the latter is as great a Crime in the Eye of the Law.

Our Author says, That "nothing is a Punishment but what affects a Right, strictly so called." This we allow; but what call we a Right, but whatever Claim a Man hath, either by Reason or Equity, to any Goods or Chattels, real or personal? *Jus est ars boni & æqui*, says the first Law in the Digest *de jure & justitia*; and the 90th *cod. de regulis juris*, comprehends Equity, under the Definition of Right. Now hath not every Child at least an equitable Right over the Property of his Ancestors? Nay, by the *Roman Law*, even spurious Children, tho', to a general Intent, *fili populi & nullius*, yet, in this regard, were *fili parentum*, and had a Right to Aliments and Nurture, tho' not bequeathed them by the Will of their Parent. Hath not every one a Right to subsist? And doth not the taking away the Means of perfecting that Right affect the Right itself? This is the Case in regard to Forfeitures; therefore the Forfeiture must be a Punishment of the Children, who may probably be very innocent.

Our Author, to avoid this Inconvenience, makes a Distinction between suffering for the Guilty, and being affected by their Punishments;
and

and puts the Case of a large Fine imposed on a Father, which may ruin his Posterity. This, says he, is a Misfortune, not a Crime. Be it so. But the Cases widely differ; for there the Children cannot be separated from the Father: And the Punishment affects him in a nearer Manner than it doth his Children; for if he hath any real intailed Estate, that only can be extended during the Life of the Father; and the Interests of his innocent Posterity are intirely saved. "How many are there, says he, that come in-
"to the World without any Patrimony?" Very true: But where there is no Object, there can be no Right, consequently no Demand. But we are supposing the Case of a Patrimony, and an established Object, consequently a Right already acquired.

Losses by Warfare, Fire, and Shipwreck, are Punishments in the Hands of the Almighty, whose Motives are as unsearchable as his Decrees are irresistible.

The Assertion, that Children have nought but a derivative Right from the Father over his Property, is much too general; for thereby it excludes that original Right which certainly they have over such Property, so far as relates to the providing them with Aliment and Nurture: This daily Experience shews. The Obligation which a Father lies under, to pay for Necessaries provided for a Wife or a Child, is a Proof of it: And our own Law hath so effectually provided for the former, after his Death,
that

that no fraudulent Conveyance shall bar her of her Dower; and consequently her Right to it must be original, from the Time of her Marriage. Shall Children then be in a worse Condition than a Wife? and shall not the Aliment and Education allowed to them, be in equal Proportion to the Circumstances of the Father, as the Dower of a Wife is to the Fortune of the Husband? Certainly the Citizens of *London*, and the Parliament, had an Eye to this Reason, when they introduced and confirmed the distributive Custom which hath so long prevailed in that City. And the Legislature had such a Regard to these Considerations, that, in order to render the Lot of Widows and Children more easy, 33 *H. VIII.* gives a Power to a Man to dispose of Two-thirds of Knight-Service Lands, by Will, or otherwise, either on Consideration of an Advancement of his Wife or Children, or for the Payment of Debts, tho', by that means; the Crown and the Chief Lords were as much prejudiced by Loss of Wards, Liveries, and Primer Seisin, as they would be by the Abolition of Forfeitures and Escheats for Treason and Felony, &c. As therefore the Posterity have not only a derivative, but an original Right over the Goods and Property of the Father, it is at least a Punishment, if not an Injury, to deprive them of that Right.

Our Author admits, a little lower, in *p. 12.* that "a Subject should not be made incapable
" of Civil Employments, without some Crime

“ committed by himself.” But is not the depriving a Man of the Means of Subsistence, not only a tacit incapacitating him from ever attaining such Employments, but what is much worse, even from living? This Writer, in his Remarks, regards Riches as *contingent* to the Person of the Subject, and only founded on the Laws of Society; and lays down as his fundamental Principle, that “Inheritance is the Creature of Civil Society.” This Principle is the Basis of his Argument; and, indeed, if this be overturned, the Whole falls to the Ground: And tho’, if it stand, the Arguments in favour of the Clause, the Subject of Dispute, are much weakened, yet many strong ones may still be urged. From this Place therefore, in order to observe some Regularity in these Sheets, we will go upon the following Propositions: *First*, That the Right of Inheriting is conferred by the Law of Nature, anterior to Society. *Secondly*, Supposing it be not, the Clause of 7 *Annæ*, c. 21. is very just and salutary, and ought to be no longer postponed. Our Author, *p.* 13. considering the Law of Nature in two Senses, hath led himself into a great Mistake, by confounding it with the Law of Nations. By the first of his Definitions, it is only to be understood as the true and original Law of Nature, which is nothing else but those Laws which every Man hath originally engraven in the Heart, and which are enforced by Motives so self-evident, that they want no Proof.

To prove my first Point, let me lay down these Propositions, previous to any Remarks on the Pamphlet now before me: *First*, That it is the Duty of Man to propagate his Species. *Secondly*, That it is an equal Duty to maintain those whom he hath brought into the World, in a manner suitable to the Education he hath given them, and his own Circumstances in Life. These Propositions admitted, it naturally follows, that the Children have a Right to exact the Performance of this Duty; for where-ever there is a Duty on one Side, there is a Right on the other. These Duties cannot be complied with, without making the Children, in some measure, Partakers of the Effects of the Parents during Life; and transmitting them to the former after the Decease of the latter. As the Children therefore, have a Right to exact the Thing itself, consequently they have an equal Right over the Means. The next Thing, which I think not unnecessary to prove, is, that the Coalition of Men into Societies, hath not, in the least, deprived the Children of this Right, but given them a better and more extensive one. The contingent Relations, as regarded by *Pufendorf*, are three; Husband and Wife, Father and Child, Master and Servant: Two of these are as clearly founded on the Law of Nations; as the other is on the Law of Nature; and was indeed, the Original of the Law of Nations; for, before the Formation of Societies, every Father, and his Family, formed a little State; and, in that State, the Laws of Nature were followed,

followed, and mutual Duties observed, as arising from that Law: On the Side of the Father, Maintenance, Support, and Protection; on that of the Son, Obedience, and Assistance. Several Fathers, either through Conveniency, Fear, or Ambition, afterwards agreed to form Societies, and to chuse one common Father, on whom all these Obligations were transferred: He, therefore, was equally bound to protect and support every Member of the Society, regarded as his Child: And, by this means, the State of these Children was bettered; for, in Default of the natural Father, they had Recourse to the political one. Now, that this Institution should be perverted, to deprive them of that valuable Right of inheriting a certain Subsistence, a Right they had before, is what no one can well conceive.

Hence it appears, That both by the Law of Nature and Nations, the Right of Inheriting is given to Children; and that it hath only been barred and interrupted by the Municipal Laws of divers Countries, originally introduced by some covetous Tyrant, assuming Nobles, or more jealous Demagogues.

I now come to follow the Author, in his Considerations and Arguments. The *first* is, That, "in a State of Nature, we can take no more, nor hold it longer than we live, and are capable of using it." In order to answer this, we must distinguish between Occupation and Use. A Man may occupy, and take many

Things, which he cannot use: If a Man who hath only one Child, possesses himself of a large Palace, he may occupy it all, tho', perhaps, he use not a Third of it; but he may take it, in Expectation of having more Children, and a more numerous Family.

The *Roman* Law followed this Distinction, calling them by different Names *Ususfructus*, which implies a Pernancy of Profits arising from Things too large for our own Use; and *Usus*, which only was a bare Right of using it one's self. See *Dig. de Usufruct. & Usu.*

Admit, as to the *second* Clause of the Objection, That we can hold it no longer than we live, yet the Children have already had Occupation, and are become Primer Occupants, by having taken Part of the Profits, in the Life of the Father. And, *lastly*, If we search into Common-Law Reasons, why may not the Seisin of the Father be regarded as *their* Seisin, and the giving them Nourishment from the Land, as Attornments by Tenants for Life? *Secondly*, he says, That "there is an Act of the Body required in Occupancy." But I say, That they have occupied already, by the Act of the Father, and their own Acts; and they want not a second Occupation to intitle them to the Benefit of the first. *Thirdly*, he says, That "in Descent there is no Expression of Consent of the Alienor, a Thing always necessary in the Transferring of Property." This Reasoning tends towards destroying the Ground of all the

the Laws in relation to Successions *ab Intestat.* and several others. But, in Answer to this, he says, That "it is a great Way to go, to presume a Consent and an Occupancy." Yet the Civil Law affirms it to be the natural Law, to presume such Consent and Occupancy. *L. Cum Ratio, Dig. de Bon. dam.* says, *Cum ratio naturalis, quasi lex tacita, liberis parentum hæreditatem addiceret, velut ad debitam successionem eos vocando.* To the same Purpose are the whole Titles *de in Off. Testam.* enacting, That the Will, which gave not a legal Part, *i. e.* the Fourth of the Testator's Inheritance, to his Heirs, should be so far void; and it was branded with the Name of unnatural and undutiful (*Inofficiosum*). In what manner our Author intends that Nature shall provide for the Children, if the Right of Inheritance be not a natural Right, is a little unaccountable; for, says he, the Father, if aware of his Death, must make a *Donatio mortis causa* (which I did not know to be an Institution of natural Law); or, if not, the Law of Benevolence compels those who take Notice of them, indiscriminately to support them. At this Rate, a Man who hath no Affection, or natural Tye, to such Children, must be burdened with the Maintenance of them, because some Intruder hath occupied their Father's Effects before that. But, says he, "If either the Children are grown up, and have enough for their Subsistence, they are barred by the same Reason that otherwise gives it to them." That I must deny; for

for tho' a Man may have enough for himself, yet the Law of Nature commanding him to take care of his Posterity, he is obliged to improve all Opportunities to be able to do it.

"Or if," continues he, "they are unable to maintain themselves, they cannot occupy; and therefore complete the Transfer." But is there not a Presumption, that tho' they cannot, their Guardians will occupy for them? Add to this, that all Authors, on the natural Law, admit of an Occupation, as well implied as expressed. And, *lastly*, This Descent may be regarded as a *Traditio brevi manu*, or a feigned Livery, laid down as a natural derivate Acquisition of Property. *Vin. ad 2 Inst. Tit. 1.*

We now come to the Inconveniencies arising from allowing this as a natural Right. He says, it will extend to all his Kindred, in their several Degrees. So it will, on the very same Principles, that they are, in some measure, his Children, or Descendents of Children of the first Occupier: And the Rule, *Qui prior in linea, potior in jure*, sure may well be allowed to be of the Law of Nature; and the Three first Chapters of the 118th *Novella* are taken from thence.

Prescription, to be sure, is a natural Right; and, as it is introduced for the Quiet of all Men, goes equal Pace with the Doctrine of Inheritance, which tends full as much to the Benefit of the publick Tranquillity: For would there not be more Confusion, in leaving the Inheritance

he
tha
Bl
gal
in
elap
acq
wh
Dif
ra
Rig
ed t
as to
even
sole
null
O
" as
" du
" ou
" D
be fa
more
confi
And
" tha
" for
" cou
swer
greate
Prospe
Mem

heritance to be seized by several Occupants, than to let it quietly descend to the next in Blood? Besides, it favours too much of a legal Fiction, to suppose that any one can claim, in the natural State, after Time of Prescription elapsed, because, in that State we are unacquainted with Courts of Record, or Deeds, on which Titles are generally founded. As for the Difference between *Jura hæreditaria* and *Jura sanguinis*, I will readily allow it; but this Right of Succession to the 8th Part was allowed to Bastards, in Default of Legitimate: And as to Aliments, in some States it was allowed, even to Adulterate Children: So that it is not solely *Jus hæreditarium*, but *Jus sanguinis*, & *nullo jure civili derimi potest*.

Our Author now states an Objection, That "as this Right of Inheriting was a Law introduced for the Benefit of the Children, they ought not to be obstructed thereof by the Demerit of the Father." Many Things may be said in favour of this Objection; but the more sure Way of establishing it, will be by considering the Answers which he has made: And the principal Answer affecting them, is, "that the Right was introduced on the Reasons of the same public Utility which accounts for the Interruption of it." In Answer to this, I say, Nothing can possibly be of greater Utility to Society, than the Increase and Prosperity of all the Members. How these Members can be increased, or can prosper, where

where the Crimes of the Father are punished on the Children and Posterity for ever, seems to me very difficult to be conceived. Is it not hard, very hard, that the Grandfather, who is fighting, and dies for his Country, should leave the Grandchildren helpless and Vagabonds, because the Father is an attainted Traitor ?

Our Author, *p.* 23. thinks this Provision very unequal, as both doing too much and too little. He says it does too much, as giving the Inheritance to those Children who are not in the weak State of Infancy and Orphanage, which was the first Ground of this Right. I cannot see how that can possibly be the sole Ground of it. That it is Part of it, I admit; but the Duty to support one's Children ceases not at any Time. It is a Duty that is not local, temporary, or conditional, but absolute and binding, at all Times, and in all Places; nay, even after one's Death. The Son, in the State of Nature, and according to the *Roman, Persian,* and other Laws (*Heinnecci antiq. jur. Rom. tit. Pat. Pot.*) was not capable of doing any Act, in the Life of the Father: Without his Consent he could acquire nothing for himself; and this Law was not instituted by Statute, but merely by Prescription: And, indeed, all universal prescriptive Laws, if well looked into, will be seen to be nothing but the Traces of the Laws of Nature. That this was so, appears from *L. 8. Dig. de his qui sui vel alieni*

alieni juris sunt, jus patriæ potestatis moribus receptum est (established by Custom); and it never ended till Death, either natural or civil, or till Manumission; and even the Bearing of a Magistracy only suspended it, as appears from *L. 9. de eo Tit.* And, by reason of this Power, the Son could acquire nought but by his Father; and whatever he held was his Father's, even the *Peculium Profectitium*: And, by Consequence, at his Death the Son was left without Subsistence, and stood in as much need of the Inheritance as an Infant. Therefore, if the above Reason was allowed, whenever the Son happened to be absent, at the Death of the Father, another might enter on the Lands, which the Son had occupied, and so oust him; for, by the Civil Law, his Occupation was only an Occupation of his Father; for then such Lands are equally abandoned as those of the Father. What Inconvenience would thence arise, what Hardships to all Men, let any one judge. Can there be aught more cruel, than to press a Man into military Service, and refuse him his Stipend?—Children are all in this Case.

I am aware, that the Considerer may object, That the Acquisitions made by Children, for themselves, by the different *Peculia*, were their Provisions, and Means of Support. But these are a mere civil Institution, and of very late Date, even so low as the Time of *Julius Cæsar*, and then only given to Soldiers; yet not

D

thoroughly

thoroughly known and established till the Time of *Trajan*; and the *Quasi Castrense*, or what was got by the Children in *urban* and *domestic* Employments, does not appear to have been introduced till the Time of *Theodosius* the younger; and the Accessory not till the Time of *Justinian*, L. 6. C. de Bon. quæ Lib.

Now, if we consider the different Natures of all these Sorts of *Peculia*, we shall rather collect from them Reasons in Support of our Argument. They are, as appears above, of three Sorts: 1st, The Military, which consisted of nothing but the Acquisitions in War: And, in Reality, this was nought but a temporary Subsistence justly given to the Son, whilst he was absent from his Father, who, at that Time, could not provide for him. The *Quasi Castrense*, or *Urban*, when truly considered, is nothing else, it being originally introduced in Favour of the Governors of the Provinces, who during their Administration were absent, and received not the Provisions they ought from their Father. The next Persons laying Claim to it, were the Advocates, who at *Rome* served both as Solicitors and Counsellors, and to whom (when Justice became venal there) it was, in favour of their Clients, granted, that they might have a sufficient Stock, to solicit their Causes. The like Consideration, in favour of Merchants, made it necessary to extend this Privilege to Tradesmen, in general.

The

The *third Peculium* is the *Accessorial*, or that which descends on the Son, by the Gift of any Stranger. The Introduction of this was owing to the Consideration of that very Right now in Dispute, the Right which Children have to inherit to their Parents, as well to their Mother as to their Father ; for to her Property alone did *Constantine the Great* extend his Law, 1 *Cod. de Bon. Mat.* for he there says, *Parentes, penes quos maternarum rerum utendi fruendique est [tantum] potestas, omnem debent tuendæ rei diligentiam adhibere, & quod JURE filiis debetur, &c.* This Law shews how well convinced that wise Christian Emperor was of the natural Right which Children had to succeed to their Parents ; for if that was not the Consideration, why did he not extend this Law to Grants made to Children by Strangers, or to Effects bequeathed to them by Testaments ? But this was not done till long afterwards, by *Leo* and *Anthemius*, as to Acquests by the Wife : And the Foundation of this was a Consent of the Father ; for as his Consent was absolutely requisite to the antecedent Marriage, by that he consented, and gave to the Son all the Property acquired by means thereof : But, at last, *Justinian* extended it to all the Effects coming to the Son. I mention not the *Profectitium*, or derivative *Peculium*, which was only the Stock of the Father in the Hands of the Son, over which the latter had no Right of Property.

As the Origin of all these Laws seems, in some measure, to ascertain this Point, so does the Extent of the Power over the *Peculia*, set it still in a clearer Light: And, 1st, Over the military Stipends, the Son had free Power to use it, and dispose of it, either by Grants, during his Life, or, at his Death, by Will. And, in this Power, not only the general Privilege given to all Soldiers was regarded, but the *Roman* Legislature had most certainly an Eye to the Support of the Son; for if he could not bind himself for Payment of Necessaries, and pay his Debts, by bequeathing his military Effects, how could he, in a foreign Country, City, or Camp, support, and maintain himself? And, for this Reason, our Laws make valid Bonds and Contracts made by Infants for common Necessaries. 2 *Inst.* 172. Over the *Urban Peculium* some Commentators much doubt whether he had any thing more than a Tenancy for Life, as we may call it, without Impeachment of Waste, *Ufusfructus*. Others suppose he might dispose of it either by Will, or by Grant; and the major Part of the Civilians confine his Power only to Grants and Contracts. — This last Opinion seems to have been originally the right one, as appears by *Ulp.* 20. § 10. who confines the Power of Testating merely to the *Castrensis Peculium*. This appears too from the Reason of the Institution, which was, that the Governors of Provinces might have wherewithal to subsist, and to answer for Mis-

managements

managements and Conversions of public Money to private Uses; Advocates be able to solicit the Cause of their Clients, and to repay any Damages they might fraudulently occasion; and Merchants and Traders to carry on their Trades, and pay their Debts: For all these Purposes, the Power to dispose by Grant is sufficient; and on the Death of the Son, who could not make a Testament, the Successor *ab intestato* was answerable for all Demands, as far as the *Peculium*, reverting into his Hands, would go. See *Dig. de Benefic. Inventarii*. And the Law remained, in this respect, unchanged, till the Time of *Justinian*, § *ult. Inst. de Militari Testamento*, who declared they might bequeath it, and settled this long litigated Point.

But nothing confirms our Opinion more than the Use and Enjoyment given to the Father, of maternal Goods, and the Property to the Son. This the Son could not dispose of by Will or Grant, as appears in the *Roman Law*; but it was left to descend to the next Heir. This shews how careful the Law was of the Right of Inheritance; as the giving the Use to the Father, even of accessorial Property, descending from Strangers, demonstrates the Protection the *Romans* gave to the paternal Power, the Favourite of their State, both the most ancient Institution, and that which lasted the longest of any in the whole Republic; and Traces of which still remain in all States, where the Civil

vil Laws are made use of. And the only Way he had to acquire Power of a Transfer, was by the Consent of the Father, which thereby became rather the Transfer of the Father than of the Son; for even the former could not give his Son Licence to make a Will.

From all these Reasons we see, that, in the State of Nature, nay, in civil States, the Son, tho' never so old, at the Death of the Father, without the Assistance of the Right of Inheritance, was left as destitute as when born; and that the Introduction of the different Sorts of *Peculia* are all either grounded on some presumptive Contract of the Father, or for the Safety of a third Person; and none for the Provision of the Son, to whom the Law presumed the Father's Sustenance would always descend. The most ancient Laws always deviate the least from the Laws of Nature; and there is no State we ever read of, which hath not embraced this Right of Inheritance: Whence it may be easily conjectured, that this is not the Creature of Civil Society, but an Institution of the Law of Nature.

To put the Point out of all Dispute, what can be a more evident Proof of the great Veneration the *Romans* had for this Right, than the requiring no less than an Act of the *Comitia*, the General Assembly of the State, to give Sanction to a Will, the first human Invention to interrupt it? *Vinn. ad Instit. de Testam. ordinand.*

Our

Our Author also says, That "the Provision is too little; and the Inheritance should be equally divided, if the Benefit of the Children was the principal Cause of this Establishment." No doubt, if this be a Civil Establishment, the Benefit should have been equal, as it was certainly in the State of Nature, and as it remained in the Civil Law, as evidently appears from the calling all the Persons, in equal Degree, to an equal Share of Inheritance; and even admitting a Right of Representation to the Children of a deceased Son *. This shews what an Eye the Civil Law, in confirming the Natural Law, had to the Benefit and Privilege of Children: And, in all Probability, the Partibility of Gavelkind Lands was a general Custom throughout this Kingdom, as well as in the County of *Kent*: And our Legislators have, at different Times, had so great a Regard to an equal Provision for Children, that by 33 *H. VIII.* and 12 *Car. II.* they have revived that Custom, in the most material Part, the Devisibility of them: And the Custom which still prevails almost all over *Europe*, of bringing Lands and Goods into Hotchpot †, is an Evidence how much the Laws have always regarded the Posterity of every Man, and the Equality to be observed between them. For the one, let the *Titles de Poss. Bon. cont. Tab. de Inoff. Test. & de Echard. Lib.* suffice: For the other, the 118th

* *Novella* 118. cap. 1.

† See *Dig. de Collat. Bon.*

Novellæ. & Dig. de Collat. Bon. & de Famil. erſciſcund. To thoſe I will add two Articles of the Edicts of Geneva : They are Article 1 & 2. *Tit. 23. de Succellions ab Intellate. Lors qu'il ſ'agira de ſucceder ab intellat dans les biens d'un pere, ou une mere, il n'aura aucun difference de ſexe, &c.*—*Et ſ'il y a des descendans dans un degré plus bas, ils reprefenteront leurs peres & meres ? Les enfans qui auront receu quelques bien, argents, fonds (Land), ou autres choſes, ſoit en faveur du mariage, ou d'une autre maniere, ſeront obligés d'en faire rapport, ou tenir conte; & en faiſant cette collation ils ne pourront être exclus des ſuccellions, &c.* Nothing can ouſt them of this, but an expreſs Declaration of the Donor to the contrary ; which Cuſtom is alſo purſued to the Letter, with the ſame Reſtriction, in the City of London, 1 Lord Raym. 485. And on the equitable Reaſon thereof is founded the excellent Law of Diſtributions, 22 & 23 Car. II. cap. 10.

Hence we ſee, That this Inſtitution, be it admitted to be civil, was not inſtituted for the Benefit of the Society in general, ſo much as for that of the Poſterity of Particulars ; for, if the Benefit of Society had been originally conſidered, this Right of Succeſſion would have been given to one ſolely ; in order to have avoided all Suits, it would have been limited to one : But we do not find this done, even in regard to the Succeſſion to Kingdoms ; for we find even them diviſible, very low down, ſo low

Now as *Henry II.* in *England*. In the Fourteenth Century, *France* was dismembered in such a manner, to provide for younger Children, as it required three Ages to place it on the same Point of Grandeur, and cure its intestine Disorders. Let us therefore conclude, that this Civil Institution was introduced for the Benefit of the Children; and very proportionable and equitable in every respect, till changed by the Depravity of the Times. How this Right is ineffectual to the Children, both in a State of formed Society, and of Nature, and how they could have been provided for in a better manner, I cannot see, than by this Right of Inheritance, without an Expence to the State; and a levelling Scheme followed, which will necessarily reduce all to Anarchy and Confusion: And that of a public general Education, is too visionary a Scheme; and, indeed, our Author has answered this very Objection himself. Though, therefore, every one may renounce a Right introduced for his Advantage, yet surely he shall not be deprived of the Advantage of such Right, by the Act of a Third.

Our Author comes now to his favourite Argument, That "as a Father may obstruct Descents by Alienation, why not by Forfeiture?" He who proves too much, proves nothing at all: Now, not to argue from the subtle Refinements of the Law, that the Bar, in Case of common Recoveries and Fines, always arises from a supposed Recompence,
F
equally

equally as a Warranty with Assets, if this be allowed to be the Reason of Forfeitures, not only the Issue, but the Reversioners and Remainders, will be all docked of any Remedy. *A hard Strain on them*, says Lord Chief-Justice Holt.* And tho' the Law hath given a Man this Power to alienate and exchange, yet, surely, the original Foundation thereof is more to be considered in favour of Children †, that the Effects of a Father might be more distributed, and not confined to one alone. Besides, this is only a contingent Reason, derived from our own Municipal Laws, not a Reason which proves the Equity of the Law in Debate: Nor is it a Consequence, that because a Man may make a good Bargain, or provide for himself, his Children should, by his Act, be debarred of Sustenance for ever. And tho' our Laws give an unlimited Power to every one over his Estates, yet the Civil Law, more consonant, in this respect, to the Law of Nature, tho' it extended the paternal Power further, yet preserved the Inheritance to Children, as sacred; and that by two Ways: 1st, If a Man was prodigal, and wasted his Effects in such a manner, as there was Reason to fear the reducing his Family, a Commission of Prodigality issued against him; he no longer was intrusted with the Management of his Effects; his Contracts were no longer of any Force; and he was intirely looked on as a Lunatic or Infant; and no more to be

* 1 *Ld. Raym.* 478.

† 3 *Co.* 5.

trusted than either of these. And this was the Law of the Twelve Tables; and continued to the Time of *Justinian. Dig. de Curat. Fur. & Prodig. 2dly*, If a Father had reduced the Circumstances of Children by Grants, they were null, so far as they deprived the latter of their legal Portion * for the Children: Or if a childless Man gave away his Property, and after had Children, so great a Regard had the Law for them, that the Grant became void †, tho' made even for pious Uses. Nay, even our own Civilians have, in some measure, followed this Practice, by making a future Marriage, and Birth of Children, a presumptive Revocation of a Will, devising Effects of the Father to a Stranger, 1 Lord *Raym.* 441. And no one could disinherit a Son, but for some Reasons prescribed and allowed by Law. All which were set down both in the Code and Digest, *Tit. de Exhered. Lib.*

As therefore this Power of depriving Children of their Subsistence, is against Natural Law, and all Right, it ought to be taken strictly, and not, by Consequence, made an Argument to deprive them still more and more of their Claims.

The Corruption of Blood is, to be sure, as our Author says, a necessary Consequence of Forfeiture; for, if a Man be not capable of transmitting Property by himself, he cannot serve as a Conduit-pipe to receive, in order to

* *L. 1 Cod. de Don.*

† *L. & Cod. de Rev. Donat.*

transmit it to others. But tho' the Right of Inheritance be a natural Right, yet an Heir, in the State of Nature, may well be regarded as a Purchaser; and that by every one of the Means mentioned by the Author himself, as Acquisitions by Purchase, *viz.* Occupancy, Emption, and Gift: The first and last by a legal Presumption, or rather natural one, that the Father occupied as well for his Son as himself, and made a Gift to them; the other, by supposing that the Son, by his Pains and Acquisitions, during the Life of the Father, has purchased the Inheritance. But as to the first, say they, the Corruption of Blood immediately ensuing Attainder, he can no longer occupy; and the Demandant is barred to say, that he is his Son; nor can a Man attainted make a Gift. These Objections arise upon the very Act of Parliament wanted to be repealed, as soon as with Safety it may be; therefore, on the present Occasion, they should have no Weight. But still, it plainly appears from several Instances, that an Attainder, by the Law of Nations, could not do that; for tho' the *Romans* stretched that Matter as far as possible, in their *Capitis diminutio maxima & media*; the latter of which expressly resembles our Case; yet we find, that, till the Law of Treason was made by *Augustus Cæsar*, *P. Manucius de L. J. M.* no Forfeitures were incurred: And that more plainly appears, when we consider what were the Rights lost by these Attainders. The *first* was Liberty:

erty: By this Right they were protected from the Power of their Masters, Tyrants, Magistrates, and Creditors, and had Freedom of Suffrages. 2^d, The next Right of Gentility: By Loss of this they lost nothing more than Honours and Distinctions; which I readily allow are Creatures of Society. The 3^d was the Right of Wedlock: This affected only the Guilty, and restrained him from contracting any future Marriage, the prior being dissolved *ipso facto*: And that for this Reason, that Marriage was a particular Right of *Roman* Citizens; but the Authors say not, that the *Conjugium*, a Right of Nation, was dissolved by the second Attainder; or the *Contubernium*, or Concubinage, a Right of Nature, by the greatest.

Some allow the paternal Power to have been a Right appropriated to the *Roman* Citizens: But that this was known long before, in its greatest Strength, appears from the 22^d Chapter of *Genesis*, ver. 9, 10. For tho', in that Case, there is an express Command of God, yet, surely, we may apply the Maxim, That *the King can do no Wrong*, with more Certainty, to the Almighty; and imagine, that *Abraham* had, by natural Right, a Power of Life and Death over his Son, or God would not have required the latter as a Sacrifice. That this Power was in Practice with all Nations, appears from many Histories, in particular those of *Cyrus*, *Oedipus*, *Paris*, and *Moses*: Tho', generally, this Power was exercised by Princes;
yet

yet we find, that those Princes were not much more powerful than the *Venetian* Doges; and, certainly, if they had not a legal Authority, would have been deposed by their Subjects. *A Right introduced for the Benefit of Testator*, says Lord *Raymond*, Vol. 1. and is rather detrimental to the Issues than beneficial. The Right of making Wills, to be sure, is a Civil Institution, and was a Right of *Roman* Citizens, consequently lost by Attainder; so must the Right of acquiring Property, or Inheritance, tho' a natural one, or claiming by Prescription: But then this Right was only taken from the Person guilty; neither could his Son, or Posterity, be debarred thereby. Nor doth it appear, that this *Capitis Diminutio* extended to the Children; on the contrary, History shews it did not, as in the Case of *Manlius Capitolinus*, and *Appius Claudius*, one of whom was executed for High Treason, the other died in Prison: And yet we find the Posterity of the latter flourishing in the Senate. Nor does *Livy* mention any Confiscation, in the Case of the former. And the worst of Times gave the Succession of *Cicero* to his Son. Hence we may conclude, that the Right of Inheriting was no further a Civil Right, than in regard to the Confirmation of it, as a natural Right. And the Reason why the Demandant could not inherit or prescribe, was because he was regarded as dead in Law. 2dly, The *Capitis Diminutio*, not extending to Children, deprived them

them not of this Right. And our own Laws have been so careful of Children, in this Case, that the second Attainder of a Parent (if so I may be allowed to term it) shall not bar any of them of the Right of Sustenance from, or Settlement in a Parish: As if a poor Woman, who is settled in *B*, and hath Children, marries in *A*, the Children above 7 Years old shall not be removed out of *B*, as those under shall, but are still to be maintained by it. *Carth. 449*. And, 3dly, Supposing Children so deprived, they may still claim as Purchasers. And this the Romans were so aware of, that the *Julian* Law was made, the Severity of which that good Prince *Adrian* was so convinced of, that he called in the Posterity of the Attainted to succeed before the Fisk; and preferred that only to the Lord by Escheat, *Law 8. Dig. ad L. J. M.* And so it remained till *Marcus Antoninus*, *L. 10. ej. Tit.* confirmed the *Julian* Law, and excluded them.

The Repealing of this Law of Forfeitures, therefore, cannot be called an Effect of personal Compassion: No; it is the Effect of Justice, and the Amelioration of our Government, which no longer fears Plots; no longer would leave a Temptation to any Ministry to take off a Man, to possess and enjoy his Fortune. The Chain of Descent was not broke originally for the Traitor's Infamy, nor for the public Benefit, but to satiate private Vengeance, and to satisfy greedy Courtiers.

Certainly,

Certainly, as the Law stands now, the Answer our Author makes to the Objection, *p.* 28. is a very good one; but the Question rolls not, in this Case, so much on the Power, as on the Justice of the Power. And the Author, when he says "the Wasting the Support is "cruel, but not prevented by Legislators," seems to forget the excellent Provision made by the Twelve Tables *de Curatoribus Furiosorum & Prodigorum*. Neither is there, in the repealing this Law, the ill Consequence of making Particulars independent of social Good: On the contrary, it is more calculated for the Benefit of Society, than the Law we now make use of: And the whole Reasons, in *p.* 32. *in terrorem*, are answered by considering, That no Man of Resolution, nor immoral Persons, who are the People generally concerned in these Sort of Proceedings, will regard any of those Reasons: Nor can it be any Punishment to them, if after their Death, their Sons are expiring for Want, in an Alms-house; their Wives begging for Bread about those Streets through which they formerly rode, in all the Pomp and Pride of Riches and Luxury; or their Daughters prostituting themselves in a Brothel, to procure Subsistence. This Picture, how terrible soever it may be, scarce ever deters them; they are always warm enough to hope for Success, and not to die as Malefactors, but to bear Rule as Judges. The Example of *Licinius Macer* is so far from confirming aught that hath been said,

FH

MVSEVM
BRITANNICVM

said, that it leaves us good Reason to repeal the Law, as it is a Means of Encouragement to every Traitor to prevent the Stroke of Justice ; and, not content with committing Treason against Man, to commit it against God ; an Evil which we ought, both as good Christians and good Subjects, to endeavour to prevent.

Our Author concludes these Arguments by these two Propositions : “ That it is agreeable “ to Justice, to bestow Rights on Condition “ —And it is the Wisdom of Government to “ lay hold on human Penalties.” Both these I will willingly assent to ; but, at the same time, cannot be induced by them to change my Opinion, till he proves, both that the last Rule admits of no Exception, or that the Law of Nature knew nothing of the Right of Inheritance ; consequently that it was bestowed by Society.

We come now to his *second* Head, wherein he treats of the Consonancy there is between all Laws, in punishing this Offence by Forfeiture. But, admitting that all States put this Practice in Use, must we put it in Use likewise ? No ; neither Time, nor a general Custom, can give Sanction to any thing contrary to right Reason, and natural Justice. The Cases both of *Mephibosheth* and *Ahab* are very different : In the first Case the Forfeiture takes Effect immediately in the Life of the Criminal, and his Life not taken away ; so here is a Kind of Agreement and Recompence, and not the Shadow of Injustice to-

F

wards

wards the Unoffending, the Offence and Punishment centring in the same Person: Add to this, that it may be regarded as a Resumption of a Grant. In the second, it doth not appear, that *Naboth* had any Children; so that *Abab* might take the Vineyard, either as an Escheat, or as Heir; and the latter is more probable to have been the Case, for *Abab* took it not till after his Death: Neither does the Prophet menace him for the taking Possession, any further than as a Consequence of the Murder.

Our Author, in his Remarks on the Laws of the *Athenian* State, acknowledges that Confiscation was only discretionary, in Case of Treason; consequently it was not a legal Attendant on the Crime, and, probably, was only made use of, when the public Money or Effects were imbezzled; or, in Cases of Flight, to compel the Traitor to return. And that, in p. 38. he seems to allow to have been the Reason, in the Case of *Themistocles*.

We now come to the *Roman* Law: And I think, that, amongst all the above enumerated Rights lost by *Diminutio Capitis*, the Forfeiture of Goods in Possession is not one; and the Law of the Digest, *Qui civitatem amisit, hæredem habere non potest*, was made long after the Constitution of the *Capitis Diminutio*. Neither did either that Law, or that Constitution, extend to any other than the Criminal; and very probably, that extended only to a testamentary Heir; which is the more likely when

we

we consider, that originally, in the *Roman State*, the *Comitia* were to be held, in order to enable a Man to make a Will; and as one attained could not assist there, he could not alter the Right of Inheritance. I think the Law is of *Ulpian*, who lived under the Emperors; and tho' the Fisk subsisted before that Time, yet it was not under that Name; neither was the Reason of instituting it, the Lodging of Forfeitures there, but the *Vectigalia*, *Tributes*, the *Census*, and other Revenues belonging to the State, such as Tenths, &c. Twentieths, &c. The Case of Flight widely differs from all others, as that is a kind of Distress to make them return. The Sentences against *Antony*, *Dolabella*, and *Lepidus*, ought to be of no Moment, only to shew, that Rights of Inheritance were so much regarded, even under *Augustus*, who, tho' he might by the *Julian Law*, made by himself (*P. Manutius ad dict. leg.*), have seized the Patrimony of their helpless Children, yet chose to have an express Sentence to confirm it.]

And *Cæsar's* moving for a Confiscation, in the Case of *Catiline*, shews, that it was no Part of the *Roman Law*; neither doth *Rosinus* enumerate it, amongst the eight Punishments in Practice in the *Roman State*. All the Severities mentioned, *p. 39.* were introduced, in the Decline of the Empire, by *Honorius* and *Arcadius*, at a Time when all Morality, Christian Charity, and Purity of Religion, were degene-

rating into Vice, barbarous Vindictiveness, and monkish Superstition.

That Forfeitures were not in Use, in Case of Treason and Imbezzlement, nor that the Heir was obliged to defend the Cause, on Pain of Confiscation, for a long time, let the Example of *Licinius Macer*, cited by our Author, testify; whose killing himself would have been of no Service to his Posterity, had he not thereby saved them from further Troubles and Accusations; the Law of the Digest, ordaining this Punishment, being made long after*.

Our Author, in *p.* 39, 40, 41, hath evidently shewn, that the Law of Forfeitures was no Part of the ancient Municipal Law of *Rome*. The Case of *Asiaticus* is widely different, he himself being punished, not his Children; and it being rather a Restitution of the concealed Booty than ought else.

Tacitus, how freely soever he may write, is not to be supposed to attack any Part of the Prerogative of those Emperors whom he wrote under; and he might as well have wrote for the Restitution of the Republic as the Re-establishment of its ancient Laws. But in *Lib. 6. Ann.* he blames *Tiberius* for converting the Effects of *Marius*, a noble *Spaniard*, convicted of Incest with his Niece, to his own Use. *Adrian*, as good a Prince as the *Romans* ever knew, re-

* The Penultimate Law of the *Code de Jure Fisci* abolishes Forfeitures, where the Criminal died before Conviction.

pealed these Laws of Confiscations, as I said before; and the Use of them was never so frequent, tho' revived by *Antoninus*, till the making the Fifth Law of the Code, a Law (says *Heinneccius ad Pand. ad L. 7. M.* and all the Commentators) wrote not with Ink, but with Blood; and the Ending of which is no more than a true Description of the State of the Children of Attaints, as well by that Law as by ours, as first made (and *Leg. Ang. Sax. 268. L. 78.*); and as it now stands, That Life is a Punishment to the former, Death a Comfort; for the Laws relating to Lands and Effects, all originally have an Eye to the Right of Descents: If my Parent, therefore, cannot provide for me, and I am deprived of that Right, and am debarred from receiving what he died possessed of, where shall I seek Subsistence?

Let the Conclusion of the Law of *Henry I.* enacting this Forfeiture, be compared with the above Law of the Code, and we shall see it is full as vindictive: The Words are these, *Et si potest fieri plus remissionis apud inferos invenisse, quam in terra reliquisse, protestetur.* Will. L. Ang. Sax. p. 268. L. 75.

I think, therefore, we may say this, That where one Course of Practice hath continued in a State for upwards of Eleven hundred Years, with little Intermiſſion, that this is more reasonable to be called the Municipal Law, than that which flourished scarce Eighty Years, without Suspension.

Tho' the Case of *Spurius Melius* is very early in the *Roman* History, yet let it be remembered, that not one Word is said of his Children; and that somewhat was necessary to appease the People, who grew outrageous upon his Execution; and that this could not be done more easily, than by lowering the Price of Corn, of which he was possessed of a great Quantity; so great a one, that, in order to amass it, he had forestalled the Buyers employed by the State: So that, in this Case, we find many Considerations which render it a very weak Precedent for instituting the Law of Forfeitures so very early.

Justinian was so convinced of the Harshness of the Law of Attainders, with regard to the Relations of the guilty Sufferer, that by the 22d *Novell. cap. 8.* he suspended and abolished the greatest Attainder, so far as in its Consequences it hurt the Relations.

The next Range of Arguments we have to review, consists of those drawn from the Feudal Laws; a Policy, he says, which has in it the Principles of mutual Defence and Freedom. The Freedom he makes consist in that the Lord could not dispose of the Seigniorship without the Consent of the Vassal. But this Shadow of Liberty was soon evaded; for tho' Attornment was necessary to all Grants of a Seigniorship, yet it soon became a Thing of Course; and a Tenant who would not attorn, was compellable to it in most Cases, in a *Quid juris*, or a *Per quæ servitia*. Nay, and so careful

careful were the Laws of this Privilege of the Lords, to compel the Tenant to attorn, that if the Tenant voluntarily attorned, even in Cases where he was not compellable, the Attornment bound him, and was good, because he was compellable by some Means. *Co. Litt.* 320. 9 Co. 86.

In this Policy, the personal Qualifications were so much regarded in the Tenant, that it seems probable, that tho' he had Issue, the Land escheated always, and was only restoreable at Will of the Lord. The only Traces of the Feudal Laws we now find, are in the Cases of Manors; and in many of them there is the Custom of paying a Fine, or Heriot, at every Death or Alienation, on Pain of Forfeiture: And this Custom seems to confirm the above Opinion. Probably, originally it was merely in the Breast of the Lord, whether or no he would re-admit the Tenant, even on the Payment thereof. From this Law, it will not be unnatural to imagine, that Confiscations first took their Birth.

The Lords being of a vindictive Spirit, if the Tenant had disobliged them, would, on his Death, refuse to restore the Land, tho' often he could urge no Reason for it. The Part of our Law resembling the Feudal the most, is the Tenure by Knight Service. Let us, therefore, consider a little the Feudal Laws; and we shall see how much they confirm the above Opinion, and how much more
rea-

reasonable they were, in that respect, than ours.

The Feudal Laws all owe their Rise to those immense Swarms of *Goths* and *Vandals*, whom the over-teeming North sent forth, to search for a Subsistence, which their own Country was incapable of providing for them. Hardy, courageous, and inured to all the Rigours of a bad Climate, they could not fail of procuring themselves an Establishment in the West, by driving out a Set of Men as luxurious, effeminate, and depraved, as their Princes.

The Eastern Empire, not yet totally enervated, consequently fitter for the Arts of War, dreading the Approach of such Neighbours, sent Succours to that of the West; and many bloody Wars ensued. The Conquerors, seeing that it required Care and Diligence to preserve their new-got Conquests, distributed the Lands conquered, amongst the principal Commanders; and these subdivided them amongst their Followers. All these Lands were given to them, on the Condition of joining in Defence of the Country; and this was the only Tax laid on them. They soon saw, that this would be attended with Inconveniencies; and that, if a good many of these Under-tenants happened to die at the same time, leaving either Females, Infants, or incapable Persons, the Troops of each Commander would be much decreased, and he obliged to hire Mercenaries to supply them. To indemnify him therefore, and to secure the State in these Cases, as a Remedy, the

the Wardship of Body and Land, and the Marriage of the Heir, were given to him: The Two first, in order to breed him for a Soldier, and to maintain one in the mean while: The other, that he might chuse a proper Man to serve under him, or hinder the Heir from contracting any Alliances with the Enemies of the State; and, that any Defect of Ability of the Heir might be supplied, the Land was left in his Hands, till the Heir paid Relief, and he gave Livery; the Acceptance of which Relief, and Livery of the Land, was merely arbitrary.

On this Footing did the Laws stand amongst the *Goths*, and so it continued, and was introduced by the *Normans* in *England*; so that it was, at the Common Law, at the Option of the Lord, whether he would give Livery or no; till the Statutes of *Marlborough* (c. 25) and 1. *Westminster*, made a Century or more after the Introducing of Knights Service, gave a Remedy to the Heir, in all Cases where the Lord either exacted extraordinary or exorbitant Relief, or where he refused to make any Livery. Therefore, as the Lawyers thought the Feudal Law too hard in that Respect, when no Objection lay against an Heir, as to his Capacity of performing the Service, why should not our present Legislators remove the too subtil Impediments which hinder an Heir from succeeding to his Father; especially where no such personal Service and Qualifications are required?

The Law cited from *Canute* shews the Custom of forfeiting Inheritances to have been very ancient in these Kingdoms: Yet we must consider, that it was a *Danish* King, who made the Law; a King, whose Claim was founded on Conquest; and, consequently, the more apprehensive of Conspiracies, and more severe in punishing the Conspirators.

Alfred (who first, in all Probability, introduced it here) was in the same Case; having just recovered the Crown from the *Danish* Usurpers; and yet not freed from the Fear of a second Attack. We first find it in his Body of Laws — *Qui vitæ domini, &c. insidiaretur, vita & possessionibus privetur.* Wilk. Leg. Ang. Sax. p. 34. l. 4.

The Author himself, on this Occasion, proves, that the Law of Feuds, consequently of Forfeitures, was so foreign to the *English* Laws, that even a Conqueror, with all his Forces and Power, when he had trampled all other *English* Laws under Foot, and, in their Stead, had introduced arbitrary *Norman* and *Gothic* Ordinances, yet durst not establish these, without the Sanction of a *Commune Concilium*, whether added, or forged, I know not: And, to compensate them for so great an Alteration, and to make it the more easily be swallowed, he is forced to give up Talliages, * to restrain Ex-

* Talliages indeed could not reasonably subsist at the same time as Feuds, i. e. Knights Service: As appears, *Coke Litt.* 85.

actions and Demands of Services to those purely feudal, and to enfranchise several who were before Villains : Tho' he destroy'd what always should be held sacred in States, the just Difference of Ranks and Degrees of Men.

Now we come to consider, whether, by 12 *Car. II.* the Reason for Forfeitures being taken away, the Forfeiture should not have been so likewise. And here the Author, in shewing how few Inconveniencies this Law of Forfeiture hath, " It affects," says he, " the Interest of the Heir, " which is derived from that of the Ancestor, and " connected with it." Tho' this is admitting a Point which I cannot think proved, yet this Argument proves a great deal too much ; for thereby a Law, which deprives the Traitor's Posterity of Life, may be defended ; for that is as derivative as the other, and would not be unprecedented. — If a Tenant break through his Engagements, yet why should an unoffending Person, to whom no Objection can be made, be deprived of that Right of Succession ? The Forfeiture of the Tenant, in Cases of Treason, is a Condition therefore without any forced Construction on Words, or unreasonable Fiction. He may be regarded as dead at the Time of the Commission of the Offence, and not possessed of Land at any time after it ; so that it may regularly descend to the Son, and, by our Author's favourite Scheme of Occupancy, take it as Primer Occupant ; and, by the *natural* Law, exclude the Entry of the King, who is

to be regarded as a Reversioner, or rather as an Occupant.

Tho' Fealty be incident to Socage, yet this last Tenure cannot be regarded as any Part of the Feudal Laws; for as, by our Author's own Account, these were only introduced by the Conqueror; the former Tenure subsisted long before his Time, as is evident both from the Etymology of the Word, and the Gavelkind Lands; all which were free Socage, as appears from the old Proverb, *The Father to the Bough, the Son to the Plough*. So it appears from my Lord Coke, who says, That every Land that was not Knight-Service Land, must be Socage.

The Land-Tax is no more to be regarded as a Remnant of Feudal Service, than the Window-lights, or any other. A Proof of this is the Assessment of it on the Salaries of those very Officers, the Performance of whose Duties was a Service established by the Feudal Law. The Land-Tax is so far from being such a Remnant, that it may more justly be looked on, not as a Commutation, but a Price paid for the Abolition thereof, and all its Inconveniences.

Our Author says, *p.* 58. that "a Man who
" has violated the sacred Relation he once engaged in, for the public Service and Benefit,
" should be excluded from it." Certainly he ought to be excluded from that, and every other Benefit. But, shall a helpless Infant, not Party, nor privy; or a Son, who, it may be, advised him

him not to embark in Acts tending to such a Violation, or even afterwards opposed him in the Perpetration of his Crime; be punished in the most cruel Manner, by depriving him of that Subsistence which every one hath a Right to expect? For this is a Punishment not barely involving the Innocent with the Guilty, but solely extending to the latter.

Notwithstanding the Insinuation, That Treasons are scarcest where the Punishments are the most rigorous; even *Switzerland* itself, the Country our Author cites, hath been the Theatre of as many Treasons and Rebellions as any State in *Europe*; and owes its Formation into a State to the too rigorous Punishment of Traitors. And *France*, tho' full as severe in her Punishments, never subsisted half a Century, without seeing some one expire for that Crime. I have before shewn, that the Confiscations in *Utrecht*, a Part of *Holland*, are redeemable. Fines are widely different from Forfeitures, as they affect principally the Person of the Criminal, and cannot possibly extend, by our Laws, to intailed Estates, so as to hurt the Issue.

I have no Purpose to examine those Parts of the Pamphlet, which contain only a Recital of the Laws, as they now stand. I will only remark, that the very Title of the Feuds, cited by our Author, *p.* 63. informs us, that, for some Feuds, no Fealty was owing: Surely, therefore,

therefore, there could be no Inconvenience in abolishing it on Socage.

A Principle of all Law, except ours, I apprehend, is here denied; *viz.* "That one attainted for a Crime is not in the same Case as one civilly dead, but he is only marked as *ad Exemplum & Infamiam.*" That the Romans were not so fond of these criminal Stigma's, appears from the Case of *Manlius Capitolinus*, whose Crime to obliterate, and render him more civilly dead, even in Memory, they made a Law, That none of his Family, a very illustrious one, should bear his *Prænomen*. By the *Maxima Capitis Minutio*, a Title in the Civil Law, which our Author compares to our Attainder, they lost all manner of Rights, and became Slaves, and were not regarded any longer as Persons, but Chattels. *Hein. de Antiq.* 93. If, therefore, this was the Case in their Attainder, why should it not be in ours?

As for its being more beneficial for the next Heir, that the Land descended immediately to the King, then to the Collateral; that is intirely out of the Question: For, if there be a Hardship or Injustice in depriving him of his Patrimony, the giving it to *A*, *B*, or *C*, can be no Alteration.

The Loss of Dower is the same Case as the Forfeiture of Lands; and, as the Arguments that may be urged as well against one as the other, are the same, it would be needless for
me

me to repeat them. I would only mention this, That the Case of the Wife is rather stronger, as no Act of her Husband can deprive her of her Right.

In *p.* 70. our Author allows the Reasonableness of the Repeal, in a Manner he is not aware of: He says, "The Crown has the Forfeiture entrusted with it, only in order to restore it to the Heir, as such Restitution may appear right from Circumstances." If the Law hath such a Regard to the Posterity, and if the Intent of it is thereby provided for in a sufficient Manner, ought not every Means, and every Manner, that is most safe, be added to the Law? And would it not be much better, to let the Land descend and go to the true Owner, where Circumstances do not shew it to be evidently wrong? And are not these aggravating Circumstances more easily to be seen? Ought they not to be more restrained than the others are, or can possibly be? This being the Case, ought it not to be put out of the Power of a greedy Courtier to conceal any alleviating, or to hunt out, magnify, and create, aggravating Circumstances, against the Issue; that he thereby may be cloathed with the Vestments of the naked, eat the Bread of the hungry, and lie on the downy Pillows of the miserable Heir; who rejoices to meet with a little Straw, a few Rags, and some Offals?

This certainly will never be the Case, while any of those, we now see near the Crown,

possess

possess it: But it may hereafter be the Case; and it is the Wisdom of Legislators not to judge by the Present only, but by the Past, and to provide for future Events. Was I sure, that none but such Princes whose Names we see in the Roll of the present King's Descendants, were to fill the Throne, there is scarce any Act of Parliament, restrictive of the Prerogative, but I would consent to repeal. But, as Ants prepare Provisions in Summer to consume in Winter, so should a good Legislative Power make use of the Temper of a just Prince to make Laws to curb the Wantonness of a Tyrant; and, under a *Trajan*, or a *George*, make Bridles for a second *Domitian*, or a *James*.

We now come to the Consideration of the Laws of *England* with respect to Forfeitures; and, as our Author endeavours to shew the Reasonableness of every one, let us follow him regularly.

First, He mentions personal Things: The Argument in Support of the Forfeiture of these is, That they are in his own Power, and descendible to his Executors, not to his Heirs. Admitting the Descendibility of them, it must be allowed to be to Heirs; for a Man cannot make a Will after his Attainder; that being merely a civil Right: And if he could have an Administrator, must not the Administration be granted to the next of kin? Neither is there more Reason to support the Forfeiture of these personal Things than real ones. How many are there,

are there, who possess very good personal Fortunes, and yet are not seised of an Acre of real Estate? Besides, many real Estates now pass as Chattels, being demised under a Term of 500, &c. Years.

The Forfeiture of Lands, and Rights of Entry on a Disseisor, and Conditions, belong to the King, by 28 H. VIII. and 33 H. VIII. on all manner of Attainders.

As great Part of these Sheets have nothing else for their Subject, than the endeavouring to shew the too great Severity of this Law, I shall not repeat any of those Arguments here; but say, that the Statute, which so expressly excludes all the Heirs, and our Laws, which shew them so little Favour, have some Connection with the Maxim, so often reproached to the Civilians, by our Lawyers, “ Better let “ an Innocent suffer, than a Guilty escape.”

The Difference of the Corruption of Blood, between Fee-Simples and Fee-Tails, seems to be a very nice one: For why may not an Heir be said to claim *per Formedon*, though no such Writ lieth in the one Case as the other? Why should not, why may not, the Father, in both Cases, be passed over as dead? To be sure the Reason is equally the same; and that more clearly appears, as he must certainly be named in a *Formedon* in Descender, if ever any Right descended to him; for the Demandant must always make himself Heir to him last seised, 8 Co. 88. And how a Grandson can

H

be

be made Heir to the Grandfather, without naming the Father, who is the mediate Ancestor, in one Case, and not in another, is something odd. And in the Case in 1 *Vent.* 413. which is also reported 1 *Lev.* 59. it is said, That, in a Mort-Ancestor, Brothers may make themselves Heirs to each other, without naming the Father, as shall the Son to the Grandfather, if the mediate Ancestor died in the Life of the latter, *Vent.* 415. *Fitz. N.B.* 491. 8^{vo} *Ed.* 1700. Consequently here is no Derivation of Estate through the attainted Person, any more in the Case of a Fee than of a Tail. And the very Reason for the above Forfeiture of the Fee, given by our Author, *p.* 65. ceases; "the naming the " Father in conveying the Descent:" And he is as much Heir to the Grandfather, in case of Fee, as he is Heir of his Body, in case of a Tail. The being Heir would be traversable as much in one Case as the other; and, on an Issue joined, on the Title, must certainly, in both Cases, be proved, or admitted. What Answer can be made to this, I know not; or what Reason given, why the same Indulgence should not be shewn to Fees absolute, as to conditional, I own I have not Reason enough to discover. That the Law is otherwise we all know and allow; but why it should, or should not be altered, is the Question.

The Reason our Author gives, *p.* 75. is, That "the Forfeiture of Estates Tail came in by " Statute, which do not extend to the bringing
" ing

“ing consequential Disabilities on the Heir.” By this he admits, *First*, That these Statutes are merely penal, and not at all tending to the Suppression of Frauds and Crimes ; for, if they were of the latter Specie, they would certainly bear a literal Construction, and disable a Man, in case both of Tail and Fee. *Secondly*, He forgets the Principle he himself hath before laid down, *Qui Civitatem amisit, Hæredem habere non potest* ; and calls him an Heir, whom he hath declared incapable of being one. “ The Reason that Fees are forfeited is widely different, because so established by Custom, and Common Law.”—We will admit the Law of *Alfred* to be under the Title of Customs now ; but that Law plainly shews this Forfeiture to be originally unknown to the *English* Constitution.

The Law, as to Aliens, hath been altered, for very good Reasons, indeed the same Reasons for which the the present ought to be, that, *cessante Ratione, cessat & Effectus* ; and, when there is no longer any Fear of introducing Aliens to Inheritance of Lands of these Kingdoms, they are at free Liberty to use the natural Right of transmitting their Inheritance to their Children. As the Laws relating to Aliens may give some Light into the present Question, I shall beg Leave to offer some Conjectures on the Reasonableness of our Laws, in relation to them.

The People of *England* had often felt the great Inconveniences arising from the Propagating of Aliens in these Kingdoms; and, by allotting Lands, by way of Recompence to their Succourers, or as a Price for Peace, had, in effect, put it in the Hands of these Servants and Pirates twice to put the Yoke of Slavery on their Necks; and a Third time, in great measure, contributed to it. They wisely, therefore, prohibited their Acquisition of any Lands; which, at that time, was naturally attended with an immense Acquisition of Power; but, at the same time, to alien Friends left all Privileges relating to their Persons, and personal Effects, as fully as they themselves enjoyed them—*Calvin's Case* 76°.—even as to Houses for their Habitation. But, as the Ligeance they owed was only temporary, and much biassed by a more absolute one, lest this should weigh with them to dissolve the other, our Forefathers prudently made them incapable of transmitting Houses by Descent, on a Presumption, that their Heirs would be equally Aliens. From the Making of this Statute it appears, that the Right of Inheritance is natural: For, had it been only municipal, there would have been no Occasion to have made any Constitution of that kind; Aliens being, *ipso facto*, debarred of such particular Rights. But perhaps it may be said, that we have no Remains of the original Act that debarred them; therefore we may suppose the Disability rose at Common

mon Law. That this was not the Case, appears from the Rise of many Families now in *England*; and even so low down as *Simon de Montford*, Earl of *Leicester*, a *Frenchman*, who lived under *Henry III.*

The Act 17 *Ed. II. Co. 12.* seems to have been the first Law relating to this Subject: The Words are these, “ And this also is to be understood where any Inheritance descendeth “ unto any that is born beyond the Sea.” The other Part of the Statute speaking of *Norman Escheats*, we find by this, that it was far from being the Common Law of the Kingdom: And tho’ *Henry II.* expelled the Aliens out of these Realms, that Expulsion went chiefly against the *Jews*, and other Infidels. — To set this Matter still in a stronger Light, the 5th Law of *Canute* deprives them of their Possessions, as a Punishment for a particular Crime; *Si alienigenæ coitus suos devigere nolint, a regione cum possessionibus & peccatis suis exterminentur.* *Wilk. Leg. Ang. Sax.* And many States have found the Laws against Aliens themselves so detrimental to the Public, that they have entirely abolished them; following the Example of the Emperor *Frederic*, who gave the Right of Succession and Inheritance indiscriminately to them all. *Authentic. OMNES PEREGRINI. Cod. de Suc. Bon.*

The Rigour of this Law was not seen in its true Light, or, at least, was not remedied, till, by 10 and 11 *W. C. 6.* it was restrained in such a Manner,

a Manner, that the Remedy was preserved, and the Grievance abolished. Why should not the same be done as to Children of Attainted? For it is not, in Reality, in Favour of Aliens that this Act is made, but in Favour of natural-born Subjects: And the giving this Ability to the Children of the Attainted would not be an Admitting of those to a legal Right, who, tho' bound to the Community " by " Nature, moral Duty, and Experience, have " disclaimed the Law, and are disclaimed by " it; and, by their own voluntary Act, have " shewn themselves Aliens in Affection;" but only a Protecting the Issues and Heirs of these Men; who still have preserved those Ties inviolable, and whose Actions have in no way declared them Aliens in Affection or Deed. But our Author too often looks on the Right of Descent as a Right beneficial to the Attainted; when, in Reality, he hath nought to do with it; and has no longer Occasion for his Estate, when the Forfeiture takes Effect: And the Means of impeding Descents were first invented for his Benefit. I think I proved before, that the Power of Alienation gives no Weight to the Case of a Forfeiture.

I gave up to the Author both Honours and Dignities; which, being Creatures of the State, and not necessary to the Support of Man, may be justly taken away.

Loss of Dower — To this also I spoke before: This only shall be added, That, as most
I
Wives

Wives bring Portions, that Portion may, not improperly, be regarded as Purchase-Money ; especially in *England*, where the plain Property goes to the Husband. Even abroad, where they have only the Administration, and the Profits, the Executors return to the Wife the Use of half as much more.

These Severities are so far from bearing a Proportion to the Greatness of the Crime of Treason, that they would readily be allowed to be much inferior to it : But, when we consider, that the Act of a Man stripped of all Compassion and Family-Tenderness shall ruin and deprive of Bread his Wife, his Children, and all his Kindred, who might one Day become as useful and dear, as the Father is detrimental and obnoxious to Society, must not we say, that such Laws are as severe as those of *Draco*, and not such as free-born *Englishmen* should live under ?

The Prelates made no Difficulty in the Code of calling Heresy Treason against God, and confiscating the Estates of such spiritual Traitors to the Use of the Church : Yet even *they* gave to an orthodox and an innocent Child the Succession of an heretical and apostate Father. *Cod. de Hæretic. & Manich.*

Our Author, *p.* 81. mentions the *Jus Postliminii* of the *Romans* ; but he forgets, that that Law was introduced in Favour of those, who had undergone the highest Attainder, and by means of which Invention they were made capable

capable to bar their natural Issues, by making a Will under the Fictions mentioned therein ; which Right, says he, was introduced in Favour of those who fought gallantly in Defence of their Society.

What Objection can he have, not to permit the 7 *An. c. 21.* to take Effect, as introduced in Favour of Persons equally meritorious ? For our Law regards every one as innocent, till convicted ; and every State should bear an equal Affection to each of its Members.

We now come to 7 *An. c. 21.* Previous to the Objection he makes to it, let us consider the making that Statute, and we shall find, that there was a very good Reason for suspending the Effects thereof, till after the Pretender's Death ; indeed the same Reasons as first gave Birth to the further Suspension ; an Invasion threatened by *France* at that Time, in Favour of the Pretender himself, latterly to support the Vagabond his Son ; and these Suspensions were only made, as a more express Testimony of the Horror the Parliament felt at all such Attempts.

The first Remark our Author makes on that Act is, That the Ancestor, by committing Treason, will make a Settlement ; and so, by his Iniquity, convey a Benefit to the Heir. — That a Man will chuse to commit Treason purely to settle his Estate, when the Law hath found out so many more certain and easy Ways, I believe will scarce happen : Nor can it be any Objection to a Law, that the innocent Person should profit
by

by the Act or the Guilty; nothing is more frequent. If a Tenant for Life commits Waste, doth not he in Remainder reap the Advantage? Besides, as long as the Ancestor lives, the Heir will be in the same Plight as before; and it is the Natural Death must complete the Right he hath begun by the Civil one.

2. He accuses it of Insufficiency, as the Forfeiture of Personal Estates still remains on the same Foot,--Whether it be so or no, or whether the Words "shall not extend to the DISHERITING of any Heir," extend not to a Disheirison of a Personal as well as Real Estate, and the Word "Heir" comprehend an Executor, or rather an Administrator, or other Representative of the Deceased, I shall not now inquire; but content myself with this Answer, That an Act, which provides for Part, ought not to be made null, but amended, when it provides not for All.

The Third Objection may receive the same Answer, without looking on the Argument as lost, and there will still remain a sufficient Sanction and Penalty in our Laws: And the Author, whoever he be, cannot wish more heartily than I do, for the Continuance and Prosperity of the present Royal Family, or be a more earnest Implorer of the divine Vengeance on all their Enemies.

Tho' our Laws, as to Tenderness in point of Forfeitures, are not to be commended, and if the 7 *An. c. 21.* hath not sufficiently re-

pealed these Forfeitures, our Author, *p.* 88. hath shewn us the Laws themselves are far from effectual : And he hath there taught every Traitor a Way to secure himself. If therefore our Laws in this Point are so defective, that a Man may, by many Conveyances, evade them, would it not have a better Effect on the Minds of all Men to repeal them wholly, as to the innocent and harmless Issues ; and, by an Act of Generosity and Law, exempt him from any Obligation to the Circumspection and Provision of his deceased Father ?

The Exactness of Justice in *England* towards Offenders of this kind is the most extensive and mildest throughout all *Europe* : Let then the Repeal of these severe Laws of Forfeitures shew, that, how severe soever the Laws are against the Guilty, they affect not in the least the Innocent.

The Case of Pardoning is not at all material to the Question now under Debate ; but an Argument of *p.* 94. must be taken notice of. Says he, “ Hence his Posterity are held obliged
 “ to a discretionary Lenity, for the Enjoy-
 “ ment of Inheritance ; which, descending in
 “ the ordinary Course of Justice, might have
 “ provoked dangerous Emotions of Family-
 “ Pride, or partial Regard to their Ancestors ;
 “ and have furnished Gratifications of Rage, or
 “ Instruments of Revenge, instead of composing
 “ of Peace, or raising the Sentiments of Gra-
 “ titude ; a Gratitude heighten’d by Reflection,

“ that those Inheritances had been justly forfeited to the Laws of their Country.”

To punish a Man, because he possibly may commit a Crime, is very hard ; but yet, if the Law of Forfeitures be founded on this Argument, the Reason is neither more nor less. Will not the depriving his Ancestor of Life strike a sufficient Terror into him to keep him from committing such Crimes as the other suffered for? Or will not this Restitution be a Means of gaining Creatures to the Crown, always ready to pay the Purchase of their Estates, by a worse Treason than the first, the giving up the Right and Liberties of their Countrymen? And I cannot find out its being of any Moment to the Hopes of Families, to see this Power lodged in the Crown ; notwithstanding the Example quoted from the History of *Portugal* ; nor from a much more shining one, the Behaviour of His late Majesty to many of the Rebels in the Year 1715.--- Instances of Lenity and Moderation on this Head are very rare ; and, if we are to be governed by uniform Experience, not a few scatter'd Examples of Restitutions, we shall see the main Use of this Power, within these Kingdoms, hath been to stretch it to its utmost, to gratify some Court-Minions : Nay, often, when the Estate was not clearly forfeited, Acts have been made, by too undue an Influence, to confirm them. A glaring Instance we have of this, in *Englefield's Case*, 8 *Co.* where the Court fearing an Exchequer-

chequer-Judgment should be reversed, the Queen, pending the Writ of Error, got an Act of Parliament to confirm it : An Action which, if more generally known, would not a little diminish the Veneration her Character is now held in.

Our Author demands, “ As the Law now “ stands, what public Danger can arise from “ private Despair ?” I freely answer, None. But would it not seem more equitable and advisable, if the Way is as safe, for the Public to avoid those Occasions of Despair ? And is it not in the Government, to suppress all Evils that may arise from a Misuse of this Power by the Issues, as well as those from Despair ?--- The only Difference that would ensue, is, that the Sufferers would become more inexcusable, and deprive themselves of that Pity the Vulgar are too apt to shew to the Guilty.

Our Author excuses himself for passing over the Examples of an ill Use of this Power. Tho’, he says, there are but few ; yet, since with him I am convinced, that no one can call the Recital of them invidious in this Reign, I will put him in mind of some few of the most flagitious Abuses of that Power, since the Union of the Crowns.

James the First opened his Reign with the Attainders of Sir *Walter Raleigh* and Lord *Cobham* ; and, after the latter had been basely led into an Accusation of the former, he was let die literally for want of Maintenance ; being
deprived

deprived of a noble Estate both Real and Personal.

The pious *Martyr*, as none suffer'd for Treason under that Reign, could neither shew his Lenity nor Rigour on this Occasion: Tho' the violent Fines, imposed on all Delinquents, sufficiently testify his Disposition.

The last Years of *Charles* the Second were employed in perpetual Executions; and not one of the Persons restored to their Estates, whether executed on a true or a sham Accusation; but all of them wasted in Grants to Pathicks, Pimps, and Whores; amongst whose Children, no Doubt, we should now have seen divided the noble *Bedford* Estate, had Lord *Russell* been in Possession of it: For his Children were not restored till near the Revolution; as appears from *Burnet*.

Our *James* the Second, fond as he was of the shedding of Blood, was still fonder of this Privilege to seize the Bread of the Fatherless and Widow. And, tho' prevailed on, for his own mean Ends, to pardon Lord *Grey*, and make him a Witness, yet the Estate of the Delinquent was the Ransom of his Life. Nay, his Tools aped him so much in every thing, that they made the Traverse Jury find a Debt of 400 *l.* owing by *Goodenough* to Mr. *Cornish*, when they barbarously murdered that worthy Gentleman by Forms of Law.

I much fear the rigorous Forfeitures in *Ireland* have only served to strengthen the Hands of *France*, by furnishing them with a braver
and

and wiser Set of Officers than their own Climate can produce.

In *p.* 99. our Author cites the Opinion of Lord *Coke*, and Lord *Hales*, both great Lawyers; the former, the Life of the Law; but he was too much bigotted to it to disapprove any Part of it. Let me, in my Turn, cite another very able Professor * of Natural and Civil Law, who is now living, and enjoys one of the highest Posts in the Magistracy of *Geneva*; whom all who know him equally commend both for his Parts, Learning, and Judgment. In a Commentary on the Title *De Publicis Judiciis*, § *Lex Majestatis*, § 26. *sum.* 20. speaking of these Punishments, says, *Quæ omnia contra ordinariam juris rationem constituta (vid. 5. dig. de pæn.) ad nepotes producenda non sunt.*

Treason against our Country is Treason against our King, and Treason against our King is Treason against our Country, and both are ascertained by divers Statutes: Therefore I frankly give up the Objection he imagines may be made, *p.* 100. And I assure the Author I shall not take much Pains to defend the Man of Straw he sets up, *p.* 118. Not but that there is some Weight to be laid on it, as so many other Reasons concur; but if that was the sole one that could be alleged, I would be the first Man to protest against the Repeal of any of these Laws.

* *Monf. Burlemaqui*, Counsellor of State at *Geneva*.

P. 121. He repeats his Argument, that this is the strongest Terror to secure Government against its guilty Enemies; therefore ought not to be neglected. No, let me say: This is not the Terror that we ought most to rely on: This is a Terror that can only affect the innocent Children; and they only can feel it. A more unjust Terror, as they cannot prevent its Effects. With how much Difficulty did Lord *Lorn*, by his dutiful Behaviour, recover his Father's Forfeitures!--And is not there a noble Lord this Day living, whose Sword is employed for the Service of the Government, that is deprived of half his Patrimony, because his Uncle engaged himself in the Rebellion in 1715?—No, the greatest Terror, the justest, and the most effectual, would be the putting to Death the Criminals themselves. More are affected by the trist Solemnity of an Execution, than at the Thoughts and Reflections of the Miseries the Family is attended with. King *Charles* the First, whose Behaviour at his Death shew'd greatly the Philosopher, Father, and Christian, went off the Stage of Life with an unseemingly Concern at the Fate of his Children. And tho' some Lords use this Argument to implore for and obtain Mercy; could their Hearts be searched into at that Moment, I am confident the prevailing Passion then is Love of themselves. —The sparing a noble Earl on this Account hath been lately extolled as the highest Act of Mercy.---What Occasion would
the

the Children of that Earl have had for their Father's Life, had his Death not affected their daily Subsistence? And would the granting that Life to all Criminals be of any Use, when once this Act is repealed? Let me here add one main Reason for so doing, That "let a Man
" rely on the Steadiness of his Prudence, let his
" Heart be never so pure and clear," yet that will not be a Protection for his Innocence, while it remains daily in the Power of a capricious Father or Ancestor to deprive him of all the Fruit and Benefit he might reasonably expect from such good Conduct.

Let not therefore our Terrors be neglected: Let them be put in due Execution: But let us abolish those Severities, which, in Reality, are no Punishments, no Terrors, but only Injuries. A Man is most affected by what he knows he may one Day himself suffer; consequently he is little touched at an Evil, which, by committing the Crime, he is sure to avoid. Thus all are affected by the Execution of a Criminal, and other Punishments touching his Person; but those relating to his Offspring or Relations leave but a very faint Impression on the Mind.

Our Author, *p.* 122. takes notice of the wholesome Effects derived from this Law. I would ask him this simple Question, What the wholesome Effects of it are? --- I think, none.--- Or does he believe, that this Law hath prevented one single Treason or Rebellion in these Kingdoms? --- Tho' all Writers are apt to bemoan

moan the Degeneracy of the present Times, yet, I own, I am fond enough of my Cotemporaries to think them at least as virtuous, and as wise, and as deserving, as those who either lived under King *Alfred* *, the first Legislator we find mentioning this harsh Institution, or the *Norman* Invaders, or the Courtiers under King *James*, who put these Laws so rigorously in Execution; and who followed the forfeited Estate of a Traitor, as the *Romans* used to do the *Sportulæ*; and raised their Mushroom-Families on the Ruins of those Cedars they had so mercilessly felled.

Cæsar's Speech tends not to the Abolition of Forfeitures, but rather to establish them: And, certainly, neither the Encouragement of Traitors, or Removal of Foundations, can ensue the Repeal of these Laws, but the rendering Justice to the Innocent, and not adding *Afflictionem afflicto*; and the altering a collateral Branch of our Law, no more a Pillar of our Constitution, than the Law to burn Women for Petit Treason, or Coining. So a Man is punished effectually, the Manner is of very little Importance to the State. If of any Concern to the Public, it should be to hinder them from dying in Torment.

As the Principle I go upon cannot possibly give Birth to the Objection of our Author, p. 124. I will readily join with him in the Con-
futation of it.

* Wilk. Leg. Ang. Sax. p. 35. Leg. 4.

Example shews, that this Punishment (if so it must be called) will not deter Men from embarking in a Cause which their own Conscience told them was bad; much less in one authorized and espoused by the common Voice of the People.

The next Objection our Author makes to himself, is, "That the Repeal of this Law will be a Protection to Men of Honesty and Integrity in Civil Troubles." Protection, in the strictest Sense, implies a favourable Immunity, not that alone will be the Effect of the Repeal of the Laws of Forfeitures. --- No; from it will result an Impunity to Children for any Crime of the Father: From it will follow a Love for a Government, as a tender Mother; and a Detestation of those who rebel against so mild a Government. The Opposition made between *Henry VII.* and the *Royal Family*, p. 130. is really put in a Light too strong. For let the Title of His present *Majesty* and *Henry VII.* be impartially considered, they will both be found equally stable, and equally right: Both had their Authority founded on the Decrees of the Parliament; the former more especially so: A Decree, which, on this, as well as all other Occasions, must be the most sure Conveyance of the Crown of these Kingdoms. It was not therefore a Conscientiousness of the Defect of his Title that gave Birth to that Statute, especially at a time after *Henry VII.* had Issue by his Queen *Elizabeth*, who, undoubtedly, had

had a Title prior to that of her Cousin the Earl of *Warwick*; but to reconcile his Government, and bring home to him those Men who had been aiding and abetting the Usurper *Richard*. --- In fact, therefore, this was a tacit Suspension or Abrogation of the Laws of Forfeitures and Treasons, as to the Crimes committed under the imaginary legal Authority of *Richard* III. True it is, that, during Civil Troubles, this Law would not have its Effect; but they being ended, and the Course of Law re-established, in some Shape or other, as it must always be, let what Side soever will get the better, what Bars can be formed in Courts of Justice to the Claims of the true Possessors, without shocking and sapping the Intention of this Act of Parliament? which then would be truly looked on as the Foundation of the Right of Property. And I may truly answer the Question, *p.* 128. in the Affirmative: For the Conquerors, not only in Civil Wars, but even in other Troubles, will, in some measure, think themselves bound to follow the Municipal Laws.--Perhaps here it may be objected, That, in our Constitution, tho' these Laws were abolished, the Lands of many might be evicted by a pretended prior Title. Be it so; but is there not Means of evicting them now? And is it not less dangerous to leave one Weapon in the Hands of our Enemy, than many?

P. 129. our Author inadvertently tells us, That Confiscations, tho' used in *Florence*, were

unknown to the Constitution there.--How weak soever these Acts may be to support the Innocent, yet surely a lame Man had better support himself by a Withy, than nothing at all. And I cannot at all concur with the Notion of Lord *Bacon*, who calls the Statute to indemnify Persons for Things done under a King *de facto*, “ of a “ strange Nature ; more just than legal ; more “ magnanimous than provident.” Tho’ this Opinion maintains the Notion before alleged for the Making of it ; yet we can but observe, that all the Four Characteristics concur, tho’ set in Opposition. What can be more just, than not to punish a Man for those Actions he could not avoid ? What more legal, than to regard a Man, acting under a superior Force, rather as a Patient than Agent ? What more magnanimous, than to make such a Law in the Favour of his Antagonist ? Or what more provident, than to make a Provision for all those who might fall under the like Misfortune ? The good Effects of this providential Part of the Law were seen in less than a Century after Making of it : For Queen *Mary*, with all her Inclination to Blood, found herself restrained from putting to Death many of those acting under the Orders of the pretended Queen *Jane* ; unless those who in reality acted over her, rather than in Subjection to her : Nay, she found herself under a Necessity of pardoning Archbishop *Cranmer*, because he lay under a seeming Force.

Henry

Henry III. of France is more than obliged to the Author of this Pamphlet, for the Character of Mildness he there obtains: We find a Duke of *Anjou* joining in the bloody Massacre of *Paris*, and *Henry III.* not so much opposing the League from Tenderness of Conscience, or Affection for the Family of *Bourbon*, but jealous of the House of *Guise*, and Love of despotic Power *. Let me add, as an Evidence of his Character drawn from our Author himself, That no Prince, who ever was base, could justly be called mild.

Thus have I gone through most of the Objections made by the Considerer.--Before I conclude, let me only consider what will always be the Effects of the Law of Forfeitures, what of the Repeal. The former only tend to compel all, who have any Dependence on the Fortune of every Conspirator, to join with him in the Attempt; and, by promoting it, by its Success, free themselves from the Penalty of these Laws: While the Repeal of them keeps every one steady to his Allegiance, without any false Shew of Warmth and Zeal; often the Case, to obtain and retrieve an Inheritance (tho' equally detrimental to the Public, and beneficial to the Hypocrite); and makes him a Spectator of the Trouble, at least an indifferent one, if not sincerely desirous to protect that Government, under which he enjoys these Privileges.

* Davila, Book 7.

Supposing again this to be a mere Matter of Favour, doth not every Act, in Favour of the People, attach them still stronger to their Rulers? And will they not be more ready to defend those Laws, which preserve the Innocent in the Possession of their Property, than to espouse the Cause of those, whose avowed Aim is the Repeal of such a Law, as well as every other Institution of Government, tending to the Good of the People, or the Maintenance of Liberty? Every single Citizen, whose Character is unblemished, is a Loss to the State, when he departs from it, and adds new Force to that where he goes. Now the Departure and Loss of many of our Citizens hath been a Consequence of the Law of Forfeitures; and, by that means, we have, as it were, given Knives to our Enemies to cut our own Throats; while the Repeal of this Law would retain the Children of the Attainted at home; and, at the same time, the Remembrance of their Father's Fate would deter them from perpetrating or embarking in the same Crimes.

Thus have I ventured to make use of the same Freedom as my Author, and in Defence of an Opinion, which my Principles and Conscience tell me is well-grounded. And if in the Course of these Remarks I have been guilty of any unbecoming Forwardness towards him, I heartily ask his Pardon; and I hope he, and every one, will do me the Justice to absolve me from any *seditious Clamour* or *Audaciousness*,

as

as I cordially do him from *Court-Adulation* and *Cowardice*. The Principle and Encouragement that moved me to write the above Sheets, was, I hope, a good one : *Ne quid falsi dicere audeat, ne quid veri non audeat*. If therefore these Arguments meet with the Approbation of the Reader, I shall be more than paid for the few Moments I have spent in composing them : If not, I hope the inoffensive Stile I have used on this Occasion, and the Writing from Self-conviction, will obtain my Pardon for having wasted so much of his Time.

Middle Temple, Sept. 8.
1746.

POST-

POSTSCRIPT.

ON revising the foregoing Sheets, I was apprehensive, that some, not rightly distinguishing, might apprehend the Right of Inheritance to Patrimony, being a natural, and, consequently, of divine Right, the Right of Inheritance to Kingdoms might be so also. As this is an Objection which touches the Argument in the nearest Manner, I hope the Reader will yet spare me a little more of his Time, to set it in its true Light, and defeat it.

The Right of Property, and the Right of Dominion, are widely different; one being founded on the Necessities of Men; and, being a Right *sine quo non*, is given to the Possessors for their Subsistence: The other, invented for the Convenience of Mankind, is given to the Prince; not so much for his own Advantage, as that of his Subjects; to whom indeed he is nothing but a chief Servant. As therefore a Servant, who is faulty in his Duty, may be discharged at the Will of the Lord, so may that Prince, who breaks his Trust, be deposed, and a new created, under the same Conditions. And the one, being the Creature of the Civil Society, may

may be given on any Condition; the other, being a Right arising from the Law of Nature, ought not to be abolished. — Every Man hath Occasion for Subsistence; no one stands in need of a Power to command.

But will our Author say, Why spare you not the private Patrimony of such a Prince? Why allow not Subsistence to him and his Posterity? Surely, will some one say, the Posterity of the Prince have as good a Right to their patrimonial Fortunes, as those of private Men!

Undoubtedly they have; but the Difference is a very great one. The best Part of the Property of Sovereigns is acquired by them as Sovereigns: Their Purchases are generally made by their Crown-Revenues; the Property they or their Parents acquire by Marriage, is acquired in consequence of their being Princes, and in consideration of the Power they have over their Subjects; consequently, when regarded in their natural Capacities, have scarce any Property they can call their own. Besides, when these Men provoke the Vengeance of their Country, they generally provide for themselves and Posterity by a Flight; and the seizing their Property, and that of all other Criminals, is a Punishment on them, and their Children, who, by their obstinate Sojourn with the Enemies of their Country, become *Participes Criminis*.

The Laws of *England*, and those Men who have worthily stood up in the Defence of them against Usurpers and Tyrants, have generally

L

treated

treated the Posterity of the latter with more than Justice. They have always, when the Children were innocent of the Father's Crime, or had not any Crime of their own to answer for, preferred them to all others in the Succession (this was the Case of *Edward II.*); or, at least, provided for their Subsistence, as the Parliament in 1649 did for those Children of King *Charles I.* who after his Execution remained here. The Case of *James II.* is not an Exception to this Way of acting, but a Confirmation of the Rule.-- Not to dispute of the Legitimacy of the Pretender; tho' the Members of the Convention openly declared their Doubts, before the Throne was pronounced vacant; let it be considered, that the King had taken him away with him; consequently, no Provision could be made for him here. — Let it be consider'd also, that he daily became more and more a Party to the Guilt of his Father; that there was not a bare Possibility, but even a moral Certainty, of his following those Steps which occasioned the Deposing of his Father; and the same Impediment would be found in the one as the other.-- Ay, but, say some, there was a Possibility: Therefore you have should left a Door open for him or his Issue.—To give even a legal Reason for this, the Petition of Right may be resembled to a political Will, in which Heirs are to be instituted, others are to be Substitutes: And King *William* and Queen *Mary* were these Heirs;

Heirs ; and none but they could be Heirs : And none but Queen *Anne*, and the Princess *Sophia*, could, after the Act prohibiting *Roman Catholics* to ascend the Throne of these Kingdoms. For in both Cases a double Capacity is required in the Institutees and Substitutees, both at the Time of their Institution and Substitution. Would it have been consonant to the Dignity of the Parliament to have given the Crown to one under the Power and Influence of the exiled King, or to any of those Persons, who, by no Possibility of Law, could take it at the Time of Conveyance, without the Parliament's going against a fundamental Principle of Government, especially at the Time of giving the Crown to the Princess *Sophia*? At which time the Pretender was old enough to have imbibed all the paternal, hereditary, and *Stuart*-like Notions of Popery and arbitrary Power.

But it still may be said, Here may be Wrong done to the future Issues of these People so set aside. -- Wrong cannot be, without there be a Right. -- Now all these Issues were either born, or not born, at the time of these Acts : Those who were born had that Right most certainly ; but then they laboured under the same Bars and Impediments as their Fathers. Those not born till after this Act, as they were Descendants of Parents deprived of this Right or Title (if so it must be called) before their Birth, consequently, as I said before, where there was no Object, could have no Claim.

These

These Considerations, I hope, will be sufficient to shew, that, how foreign soever the Law of Forfeitures may be to the Law of Nature, yet the repealing thereof will by no means be an Impugning of the Principles on which the glorious Revolution, and Delivery of this Kingdom from Popery, Tyranny, and Slavery, are founded, and the Succession happily established in a Protestant Family; under which Establishment we now see a King reign, the Aim of whose Ambition is, to defend *Europe* from the Power of an Invader.—His whole Prerogative continually exercises itself in doing Acts of Benevolence and Mercy, and who, by every Action of his Reign, testifies his chief Pleasure to consist in the Ease, Prosperity, and Happiness of his Subjects.

F I N I S

